UNITED
NATIONS

AT

Administrative Tribunal

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AT/DEC/532
24 October 1991

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 532

Case No. 485: KIOKO

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Roger Pinto, President; Mr. Jerome Ackerman, First Vice-President; Mr. Ahmed Osman, Second Vice-President;

Whereas, on 14 November 1988, John Kioko, a former staff member of the United Nations Environment Programme, hereinafter referred to as UNEP, filed an application in which he contested a decision dated 15 May 1984 by the Executive Director of UNEP to terminate his permanent appointment;

Whereas, by Judgement No. 456 rendered on 2 November 1989, the Tribunal decided:

> "(1) that the decision by the Executive Director, communicated to the Applicant by the Assistant Executive Director for Fund and Administration on 15 May 1984, is hereby rescinded;
>
> (2) that the amount of compensation to be paid to the Applicant, in accordance with article 9.1 of the Statute of the Tribunal, should the Secretary-General decide, within 30 days from the date of the notification of this judgement, that the Applicant shall be compensated, without further action being taken in his case, shall be 18 months net base salary at the rate in effect at the Applicant's separation from service;
>
> (3) if the Applicant has received the amount corresponding to six months net base salary, in accordance with the

decision by the Secretary-General on 30 October 1987, that amount shall be credited against the 18 months salary set forth above;

(4) all other pleas are rejected" (para. XVI).

Whereas Judgement No. 456 was sent to the Secretary-General, through the Legal Counsel, on 17 November 1989 and was received by the Office of Legal Affairs on 21 November 1989;

Whereas, on 15 December 1989, the Office of Legal Affairs transmitted the Judgement to the Department of Administration and Management with a request that the necessary action be taken promptly and with comments on two issues raised in the Judgement, namely, the power of the Executive Director of UNEP to terminate a permanent appointment for unsatisfactory service and the competence of an Appointment and Promotion Board under staff rule 104.14(f)(ii)(B);

Whereas, on 29 December 1989, UNEP cabled the Department of Administration and Management that the Applicant, having been informed of the judgement rendered in his case, was "urgently pursuing settlement";

Whereas, by a cable dated 4 January 1990, the Officer-in-Charge of the Department of Administration and Management informed the Acting Assistant Executive Director of UNEP of the Judgement and advised him that "IN THE CIRCUMSTANCES AND ON THE ASSUMPTION THAT UNEP WOULD NOT WISH TO REINSTATE MR. KIOKO, YOU ARE HEREBY AUTHORIZED TO EFFECT PAYMENT TO MR. KIOKO IN AN AMOUNT EQUIVALENT TO EIGHTEEN MONTHS NET BASE SALARY, MINUS THE SIX MONTHS NET BASE SALARY WHICH WE BELIEVE YOU HAVE ALREADY PAID, AT THE RATE IN EFFECT AT THE APPLICANT'S SEPARATION FROM SERVICE. PLEASE EFFECT THE PAYMENT AND ADVISE ME BY CABLE WHEN THE PAYMENT HAS ACTUALLY BEEN MADE AND THE AMOUNT THEREOF";

Whereas, on 17 January 1990, the Applicant informed the Executive Secretary of the Tribunal that, since 3 December 1989, he had "been waiting for [his] reinstatement", and whereas, on 22 January 1990, the Applicant requested the Executive Director of UNEP to reinstate him;

Whereas, by a letter dated 23 January 1990, the Acting Assistant Executive Director of UNEP informed the Applicant that the Executive Director had confirmed that he did not elect to reinstate the Applicant;

Whereas, on 25 January 1990, UNEP informed the Department of Administration and Management that a cheque had been prepared for payment but that the Applicant wished to consult with counsel before accepting that payment;

Whereas, on 5 March 1990, the Acting Assistant Executive Director of UNEP wrote to the Applicant as follows:

> "Further to my letter dated 23 January 1990 enclosed herewith is cheque No. 035371 dated 6 March 1990 in full and final settlement of the compensation due to you as contained in the United Nations Administrative Tribunal Judgement number 456. ...
>
> You are requested to sign the attached copy of this letter acknowledging receipt of the sum paid."

Whereas, on 12 March 1990, the Applicant acknowledged receipt of the sum paid;

Whereas, on 22 October 1990, the Applicant filed an application containing the following pleas:

"II. PLEAS

10. With regard to its competence and to procedure, Applicant respectfully requests the Tribunal: to find that it is competent to hear and to pass judgement upon the present application under article 2 of its Statute.

11. On the merits, Applicant requests the Tribunal to find: that the Administration has not implemented Judgement 456 of the Tribunal in accordance with the conditions stated in paragraph XVI thereof; neither has the Administration restored the contractual status of Appellant nor has the Administration decided, within 30 days from the date of the notification of the judgement, to compensate the Appellant.

12. Applicant respectfully requests the Tribunal to order the Administration to implement the decision of the Tribunal immediately, and to compensate Appellant for the time that the Administration has not allowed Appellant to perform his duties since 15 May 1984."

Whereas the Respondent filed his answer on 28 November 1990;

Whereas the Applicant filed written observations on 26 December 1990;

Whereas the Applicant's principal contentions are:

1. The decision by the Secretary-General to compensate rather than reinstate the Applicant was not taken within thirty days after notification of the judgement: the period for financial compensation had lapsed and, therefore, the decision to terminate the appointment had been rescinded.

2. The circumstances of acceptance of the cheque did not contribute to a free and good judgement on the side of the Applicant.

Whereas the Respondent's principal contentions are:

1. The decision to compensate the Applicant rather than to reinstate him was timely taken and thus constituted a valid election under article 9.1 of the Tribunal's Statute.

2. In any event, the Applicant has waived any rights to reinstatement by accepting the compensation paid to him in compliance with the judgement.

The Tribunal, having deliberated from 21 to 24 October 1991, now pronounces the following judgement:

I. The application in this case seeks a determination by the Tribunal that the Respondent has failed to implement the Tribunal's Judgement No. 456 dated 2 November 1989. In that Judgement, the Tribunal rescinded a decision terminating the Applicant's service with UNEP and, in accordance with article 9.1 of the Tribunal's Statute, provided for compensation in the event that, in the interest of the United Nations, the Secretary-General decided "within thirty days of the notification of the judgement" that the Applicant would not be reinstated. The Applicant contends that the date of notification of the Judgement was 17 November 1989, but that no decision to

pay compensation to him under the Judgement was taken within the specified 30-day period. Hence it follows, according to the Applicant, that the Judgement now requires that he be reinstated to his post in UNEP as of 15 May 1984.

II. In fact, Judgement No. 456 was transmitted on 17 November 1989 by the Executive Secretary of the Tribunal to the Secretary-General, through his representative, the Legal Counsel, and was received by the Office of Legal Affairs on 21 November 1989; thus the prescribed 30-day period would expire on 21 December 1989. This procedure of notification of Tribunal judgements through the Legal Counsel, who acts for the Secretary-General in Tribunal proceedings, is in accordance with long-standing practice and is, in the opinion of the Tribunal, entirely reasonable.

III. It is customary and reasonable for the Office of Legal Affairs to analyze the Tribunal's judgements and to render legal advice with regard to them when they are transmitted to the Secretary-General. As appropriate, the Office of Legal Affairs draws to the Secretary-General's attention matters arising from Tribunal judgements that may call for further consideration and action on the part of the Secretary-General in addition to steps for implementation of judgements. In Judgement No. 456, paragraph IX, the Tribunal invited the attention of the Secretary-General to a few such matters that might warrant consideration and further action. The Office of Legal Affairs considered these matters and communicated its analysis and views to the Under-Secretary-General for Administration and Management (the Secretary-General's delegee in personnel matters) by a memorandum dated 15 December 1989.

IV. On 4 January 1990, the Officer-in-Charge of the Department of Administration and Management, by cable, informed the Acting Assistant Executive Director of UNEP of Judgement No. 456 and advised him that "... on the assumption that UNEP would not wish to reinstate Mr. Kioko...," UNEP was authorized to make payment in accordance with Judgement No. 456. UNEP received the cable containing this information on 5 January 1990, and regarded it as a decision in the interest of the United Nations to compensate the Applicant rather than to reinstate him. In the Tribunal's

view, in the circumstances of this case that was not an unreasonable reading of the cable. However, because the language of article 9.1 of the Statute speaks of such decisions by the Secretary-General being "in the interest of the United Nations", the Tribunal considers it of importance for the Secretary-General to take that principle into account in arriving at such decisions and to make clear that he has done so by appropriate words instead of relying on implication. The Tribunal considers also that a formal decision so stating should be made by the Secretary-General or his delegee within the 30-day period and communicated immediately to the Applicant.

V. The Tribunal notes that it would have been most extraordinary for the Applicant to have concluded from the language of the cable, which was shown and given to him on 7 January 1990, that no decision had been taken by the Secretary-General, or that, given the views previously expressed about his performance by the UNEP officials who terminated him, there was realistically any open question of reinstating him with almost six years of back pay rather than paying him the amount specified in paragraphs XVI(2) and (3) of Judgement No. 456. Accordingly, the Tribunal considers that in this case a decision of the Secretary-General to compensate rather than reinstate was taken on 4 January 1990, and that the Applicant was made aware of it on 7 January 1990.

VI. The Tribunal considers that the date of notification of its judgements by the Executive Secretary to the Secretary-General is necessarily the date that the judgement is received by the Secretary-General's designated representative - in this case, the Office of Legal Affairs - for the purposes of the 30-day period provided in article 9.1 of the Statute of the Tribunal.

VII. The Tribunal notes that article 9.1 of the Statute applies the principle according to which a judgement of the Tribunal must be executed by all concerned. An order by the Tribunal rescinding a contested decision constitutes the basic content of its judgement. Damages awarded by the Tribunal under article 9.1 are of a subsidiary character in the sense that they are granted in lieu of specific performance. If there should be a

deviation from the framework of article 9.1 by the Secretary-General, as here, it is for the Tribunal to determine the consequences and the effect of its judgement.

VIII. The Tribunal turns to the question of what are the consequences in this case of the Secretary-General's delayed decision with respect to payment rather than reinstatement. In determining the effect of any judgement rendered by it, the Tribunal considers that the circumstances of each case must be examined. Here the delay was relatively short. It is quite clear from the background of the case and from what occurred after the notification of the Judgement that the Respondent had and still has no wish to reinstate the Applicant. The relatively short delay did not involve either bad faith or arbitrary conduct, and was explained on reasonable grounds. Accordingly, the Tribunal considers that it would be inappropriate here to conclude that the consequence was automatically reinstatement. Nevertheless, what occurred constituted an irregularity for which the responsibility of the Administration is engaged. The Tribunal finds that an award of additional compensation in the amount of three months' net base salary would be adequate for the injury sustained and should be made.

IX. For the foregoing reasons, the Tribunal:

1. Orders the Respondent to pay to the Applicant three months of his net base salary at the rate in effect at the time of his separation from service.

2. Rejects all other pleas.

(Signatures)

Roger PINTO
President

Jerome ACKERMAN
First Vice-President

Ahmed OSMAN
Second Vice-President

New York, 24 October 1991

Jean HARDY
Acting Executive Secretary